No. 80-541

In the Supreme Court of the United States

OCTOBER TERM, 1980

COUNTY OF FAIRFAX, VIRGINIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in reversing, as based on insufficient evidence, the district court's rulings concerning the appropriate use of respondent's application flow analysis and petitioners' constructive labor force analysis as measurements of petitioner Fairfax County's labor market from 1974 to 1978.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C24)[1] is unofficially reported at 23 Empl. Prac. Dec. ¶ 31,117. The opinion of the district court (Pet. App. B1-B20 and Appendices) is unofficially reported at 20 Empl. Prac. Dec. ¶ 30,024.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1980. A petition for rehearing was denied by the court of appeals on August 28, 1980. The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1978, the Attorney General filed suit on behalf of the United States alleging that petitioner Fairfax County, Virginia ("the County"), had engaged in a pattern or practice of discrimination against blacks and women in its employment practices. The complaint alleged both a failure to hire, assign, and promote blacks and women on the same basis as white males (disparate treatment) and the use of unvalidated selection procedures with a disparate impact on blacks and women. In addition, the complaint alleged that the County refused to supply the Department of Justice with information necessary to investigate the County's compliance with the

[1] The appendix to the petition contains the order of the district court, the opinion of the district court and the opinion of the court of appeals. It has not been paginated consecutively. Reference to the appendix in this brief will treat the order as Appendix A, the district court's opinion as Appendix B and the court of appeals' opinion as Appendix C.

nondiscrimination provisions of several funding statutes.

Undisputed evidence at trial showed that until January 1, 1978, after the initiation of the Justice Department's investigation of the County's employment practices on October 27, 1977, the County destroyed records showing the racial and sexual composition of the pool of applicants for County jobs (Pet. App. B3). This destruction of records concededly violated the County's record keeping obligations under federal law.

On the merits, the government's evidence showed that blacks constituted 5.5% or less of the employees in seven out of eight job categories,[2] but 28% of service/maintenance workers. Women constituted 24% or less of the employees in six of the eight categories, but 92% in clerical positions (Pet. App. C7). A comparison of the percentage of blacks and women who applied for positions with Fairfax County in 1978 in each of the eight job categories (applicant flow) with the percentages of blacks and women actually hired by the County from 1974-1978[3] showed disparities in the hiring of blacks in all eight job categories, six of which were statistically significant (see Pet. App. B11 n.6; DX 48; A. 962):[4]

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[2] The job categories used for purposes of much of the analysis in this case are those adopted by the Equal Employment Opportunity Commission for state and local government reporting purposes. The categories are as follows: (1) officials and administrators, (2) professionals, (3) technicians, (4) protective service, (5) paraprofessional, (6) office/clerical, (7) skilled craft, (8) service/maintenance.

[3] Applicant flow figures for the years 1974-1977 were not available because of the County's destruction of records.

[4] "DX" and "PX" refer to defendants' and plaintiff's exhibits respectively. "A." refers to the appendix in the court of appeals.

1974-1978 Black Hires

EEO Category	Total Hires	Black Applicant %	Black Hires	Expected Black Hires [5]	Disparity in Standard Deviations
1 Officials	14	12.58%	1(7%)	2	—
2 Prof.	286	11.26%	20(7%)	32	2.28
3 Tech.	232	12.99%	13(6%)	30	3.35
4 Prot. Serv.	784	22.96%	81(10%)	180	8.40
5 Para-prof.	74	9.78%	4(5%)	7	—
6 Clerical	763	12.60%	44(6%)	96	5.69
7 Sk. Craft	243	13.52%	16(7%)	33	3.16
8 Serv./Maint.	793	19.57%	127(16%)	155	2.52

For women, the comparison showed hiring disparities against women in at least six of the eight categories [6] and statistically significant disparities in five categories (see Pet. App. B11 n.6; DX 49; A. 963):

1974-1978 Female Hires

EEO Category	Total Hires	Female Applicant %	Female Hires	Expected Female Hires [7]	Disparity in Standard Deviations
1 Officials	14	34.32%	4(28%)	—	—
2 Prof.	286	55.35%	97(34%)	158	7.29
3 Tech.	232	44.85%	72(31%)	104	4.23
4 Prot. Serv.	784	12.32%	114(15%)	97	—
5 Para-prof.	74	54.63%	22(30%)	40	4.31
6 Clerical	763	86.21%	684(90%)	658	—
7 Sk. Craft	243	6.89%	6(2%)	17	2.72
8 Serv./Maint.	793	10.54%	26(3%)	84	6.66

[5] Rounded to nearest whole number.

[6] The protective service category includes school crossing guards, a part time position filled overwhelmingly by women. Of the 114 female hires from 1974 to 1978, 58 were of school crossing guards (PX 1b). If those positions are eliminated, only 56 (7.1%) of the total hires for protective service jobs were female.

[7] Rounded to nearest whole number.

In addition, the United States presented evidence that tests given by the County, which were prerequisites for jobs constituting approximately 30% of the County's work force, had a statistically significant adverse impact on black employees (Pet. App. C11-C12).

The County produced no evidence rebutting the government's record keeping allegations. Against the government's allegations of discrimination in the hiring of blacks and women, the County introduced a statistical analysis of its labor market based upon the experienced and employed work force in 1970. This analysis determined, by using the zip codes of applicants' residences, the percentages of the County's black and women applicants in 1978 broken down by the eight job categories in six different geographic areas. Based upon figures from the 1970 Census that purported to show the percentage of black and female employed and experienced unemployed persons in each job category in each geographic area, the County derived constructive labor market "availability" statistics. A comparison of the County's labor market figures and its hires in each year from 1974 to 1978 showed significant disparities in the hiring of blacks in the protective service worker and service/maintenance categories in 1976 and 1977 and in the hiring of women in the service/maintenance category from 1974-1978 but did not show disparities in other categories (Pet. App. B14-B17).

With respect to its tests or other selection procedures, the County introduced evidence that it had commenced a validity study on its entry level examinations for law enforcement and fire fighter jobs, but did not offer any studies showing the validity of these or other examinations. Lastly, the County introduced extensive evidence as to its 1978 affirmative action

plan. The County had had a series of affirmative action plans since 1972 (Pet. App. C12, C17).

2. The district court found that the County had not maintained the records required by federal regulations before January 1, 1978 (Pet. App. B3, Appendix A I-VII). The court ruled, however, that no injunction was necessary to ensure further compliance with record keeping requirements (Pet. App. B4).

On the merits, the district court rejected the government's applicant flow data as being misleading for the 1974-1977 period on the theory that the County's 1978 affirmative action plan increased the percentage of blacks and women applying to the County in 1978 (Pet. App. B11-B13). The court also suggested that the plan might have resulted in an increased number of unqualified applicants (*id.* at B11). The court accordingly held that the applicant flow data did not establish a prima facie case (*id.* at B13). The court accepted the County's constructive labor force analysis, which was based upon the 1978 applicant data and the 1970 Census data, as the most accurate measurement of the black and female percentages of the County's labor pool (*id.* at B14-B16). Based upon this data the court found discrimination as to blacks in protective service and service/maintenance jobs in 1976 and 1977 and as to women in service/maintenance jobs for 1974-1978 (*id.* at B17-B18). The remedy imposed was a general injunction against discrimination in the hiring of women for service/maintenance jobs (*id.* at B20). The court concluded that no injunction prohibiting discrimination against blacks was necessary in light of the County's existing affirmative action program (*id.* at B19-B20).

With respect to the government's evidence that the selection procedures had a discriminatory impact, the court agreed that the County's law enforcement and firefighter tests had not been validated (Pet. App. B18). The court, however, gave no further consideration to the evidence (see *id.* at C13).

3. The court of appeals vacated and remanded (Pet. App. C1-C24). On the issue of record keeping, the court of appeals held that the district court should have granted injunctive relief requiring compliance with record keeping requirements and should have imposed periodic reporting requirements to enable it to monitor compliance (*id.* at C20-C21). With respect to the government's disparate treatment case, the court found unpersuasive the district court's reasons for rejecting the government's applicant flow data—that the County's 1978 affirmative action plan likely resulted in larger percentages of black and female applicants than in earlier years and that a larger proportion of those applicants might have been unqualified. First, the court noted that the County had had several affirmative action programs in place since 1972 and there was no reason to believe that the applicant flow in 1978 was significantly different from prior years. Second, there was no evidence in the record that a higher percentage of the 1978 applicants were unqualified, and even if the County could make such a showing, that was a matter to be proved on rebuttal; it did not alter the fact that the government had shown a prima facie case (*id.* at C16-C18). The court of appeals also held that the district court erred in finding the County's constructive labor force analysis to be a more accurate reflection of the 1974-1978 labor market for two reasons. First, the analysis relied on 1970

Census data that probably did not reflect actual conditions in 1974-1978. Second, the analysis used only the population figures for employed and experienced workers although many of the County's jobs require no prior experience (*id.* at C18-C19). The court thus concluded that the government had proved a "more extensive prima facie case than the district court recognized," but it declined to define "the exact contours of the case" (*id.* at C19).

Accordingly, the court of appeals vacated the judgment of the district court and remanded for findings as to the extent of the prima facie case of disparate treatment established by the government and for an assessment of any evidence adduced by the County in rebuttal. With respect to the government's disparate impact case, the court noted that the County had failed to offer any evidence of professional validation of its tests, with one possible exception (Pet. App. C19-C20, C22). The court, however, declined to reach a final decision on this aspect of the case and also remanded it to the district court for factual findings, particularly on the rebuttal evidence offered by the County (*id.* at C23-C24).

On September 5, 1980, the court of appeals denied a motion to stay the mandate pending disposition of this petition (Pet. 2). A similar motion to stay the mandate was presented to the Chief Justice, who denied it on October 9, 1980. However, on October 24, 1980, the district court stayed all proceedings on remand, including discovery, pending disposition of this petition.

ARGUMENT

Petitioners contend (Pet. 5-17) that the court of appeals' decision that the government's applicant flow analysis established a prima facie case of disparate treatment is contrary to this Court's decision in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). This contention is without merit. Moreover, the interlocutory nature of the court's decision and the fact that it is closely tied to the specific facts of this case make the decision inappropriate for review by this Court.

1. The decision of the court of appeals is fully in accord with this Court's opinion in *Hazelwood School District* v. *United States*, *supra*. In *Hazelwood*, the Court directed the consideration on remand of a number of factors relevant to the determination of the racial composition of the school district's labor market. 433 U.S. at 310-312. Many of these factors concerned the geographic definition of the labor market because that was a critical issue in the controversy below. Consideration of the geographic factors was necessitated by the absence of any evidence as to the racial composition of the applicants, which the Court noted would be "very relevant" proof of the work force to be compared with the school district's hiring practices. 433 U.S. at 308 n.13. See also *Hester* v. *Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974). Thus, as the court of appeals noted (Pet. App. C16), its reliance on applicant flow data was in accordance with the guidelines of *Hazelwood*.

The disagreement between the court of appeals and the district court in this case is not over the legal question of the relevance of applicant flow information. Indeed, the County's geographic labor force analysis was itself based upon 1978 applicant flow

data (see Pet. App. B15). The major disagreement concerned what legitimate inferences could be drawn from the 1978 records and applied to the racial and sexual composition of applicants from 1974-1977, when the County had unlawfully destroyed the records that would have directly showed that information. This question, as is apparent from petitioners' numerous references to the record (Pet. 7-9, 13-16), turns upon the sufficiency of the evidence to support the district court's conclusions. No legal issue is presented that warrants this court's review.

In any event, the court of appeals correctly found that there was no adequate basis for the assumption that the County's 1978 affirmative action plan caused a higher black and female applicant flow in that year than had existed from 1974 to 1977. The court noted that the County had had affirmative action programs since 1972, that some of the features of the 1978 plan were continuations of earlier programs, and that some of the earlier affirmative action efforts had actually been discontinued by 1978 (Pet. App. C17).[8] In addition, the court correctly found no basis in the record for assuming that 1978 black and female appli-

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[8] The statistics cited by petitioners (Pet. 7-8) do not conflict with the court of appeals' opinion. Evidence of an increase in black certifications from the Fairfax County Office of Personnel to the Police Department reflects a change in the manner of processing and certification of black applicants by the personnel office (A. 399) rather than a change in the number or percentage of blacks applying to the personnel office for police officer positions. Police minority recruitment efforts involving black colleges (A. 758-760), media advertising (A. 764-765), and special testing procedures (A. 765) were all originated prior to 1978. Even in 1978, only four of 57 police officers hired by the County were black (PX 2e at code 4118C).

cants were more likely to be unqualified than white male applicants. Thus, as the court of appeals held, the district court erred in ruling that the government had not established a prima facie case of disparate treatment. Moreover, given the conceptual [9] and procedural [10] flaws in the County's work force analysis, the court of appeals correctly concluded that the district court erred in finding that analysis to be preferable to the applicant flow analysis.

2. Apart from the merits of the court of appeals' decision, it is clearly not ripe for review at this time. The case has been remanded to the district court for further proceedings that may obviate any necessity for further review. Accordingly, review by this Court would be premature. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). Moreover, petitioners have not challenged that portion of the court of appeals' opinion remanding for further findings on the prima facie case of disparate impact that has been estab-

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[9] The County relied upon 1970 Census data of persons employed and experienced at that time. That data reflects the discriminatory patterns of employment then in existence, which necessitated the enactment in 1972 of the amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the non-discrimination provisions of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1242, and the Crime Control Act of 1973, 42 U.S.C. 3766(c) (to be recodified at 42 U.S.C. 3789d(c)). Moreover, those figures are of no relevance for most entry level County jobs, which do not require prior experience (Pet. App. C18-C19).

[10] The derivation of the data supporting the County's analysis was not explained, and the person who prepared them did not testify (Pet. App. C19 n.10). The government's first opportunity to examine the demographic data on which this analysis was based came after the close of discovery, and the exhibits submitted contained no reference to the source of the data (see A. 1718-1745).

lished by the government. Whatever the disposition of this petition, the disparate impact case provides an independent basis for a remand and may ultimately provide a basis for relief ordered in this case irrespective of the issues raised by this petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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